UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 284680
Issued to: ROBERT L. LORD, Z-505-726

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2004

ROBERT L. LORD

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 13 September 1973, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's license for two months outright plus ten months on eighteen months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as master on board SS C. E. DANT under authority of the license above captioned, on 4 September 1972, Appellant while in the Strait of Juan de Fuca negligently allowed his vessel to proceed at immoderate speed in restricted visibility, thereby continuing to a collision between the vessel and MV AEGEAN SEA.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence voyage records of C. E. DANT, certain photographs, and the testimony of witnesses.

In defense, Appellant offered in evidence his own testimony. Earlier, on a procedural matter, Appellant had called several witnesses, including the Investigating Officer, and had testified himself on an extremely narrowed issue.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order suspending Appellant's license for a period of two months outright plus ten months on eighteen months' probation.

The entire decision was served on 13 September 1973. Appeal was timely filed and perfected on 17 January 1974.

FINDINGS OF FACT

On 3 and 4 September 1972, Appellant was serving as master of SS C. E. DANT and serving under authority of his Merchant Mariner's License. C. E. DANT is a steam-propelled vessel of 12,724 gross tons, 530.2 feet in length.

M/V AEGEAN SEA, owned by Yick Fung, of Hong Kong, is a vessel of 11,276 tons, of Somali register. No other information concerning this vessel appears in the record of this case.

On the evening of 3 September 1972, having departed Seattle, Washington, en route to Portland, Oregon, with a pilot aboard, C. E. DANT proceeded to Port Angeles where the pilot was dropped at 2355. At 0000, 4 September, departure was taken from a point one mile north of EDIZ HOOK LIGHT, which could not be seen clearly enough for a visual bearing, on course 315° at a speed of 20 knots. Because of the poor visibility the engines were placed on "Stand-by." Appellant personally had the conn of the vessel and devoted most of his time to radar observation and plotting.

At 0043, having crossed to the Canadian side of the Strait of Juan de Fuca, the vessel was placed on course 284°, which would have taken the vessel ultimately back across to the U.S. side for its planned turn toward the south. At 0050, Appellant picked up on radar an inbound vessel, latter determined to be AEGEAN SEA, at a distance of 16 miles, almost dead ahead. Other vessels were discernible on the radar soope but none but AEGEAN SEA presented a problem. From that time on, all meneauvers of C. E. DANT were undertaken in response to the AEGEAN SEA situation. At 0053, with AEGEAN SEA 14 miles distant, Appellant commenced running a plot on that vessel and changed course to 270. At 0100 course was again change to 285. At 0107 a change to the left was made to 282. At 0116 course was changed to 270. About one minute later the lookout reported to the bridge that he heard a fog signal ahead. Appellant looked ahead and saw, about 30 degrees on his starboard bow, a vessel less than half a mile distant crossing from his right toward his left. Appellant rang up "stop" on the engine and ordered hard right rudder. The engine order was complied with immediately. When C. E. DANT had swung five degrees to the right, at 0118, its bow embedded itself into the port side of AEGEAN SEA, well forward. The angle of collision was about 30-40 degrees, with AEGEAN SEA on a heading of about 125-135 at the time of impact.

No person was injured as a result of the collision.

Of various fixes obtained by C. E. DANT from 0000 to 0108, the later of which utilized points on the Canadian shore, all but one were obtained by radar ranges and bearings, with no visual bearings possible. For at least 20 minutes before the collision visibility from C.E. DANT was never as much as half a mile. At 20 knots the vessel could not be stopped in less than four minutes, or within two thirds of a mile. At all times during the period in question Appellant had the direct conn of the vessel and full responsibility.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that:

(1) failure of the Investigating officer to advise Appellant immediately upon meeting him aboard his vessel shortly after a collision, in connection with a casualty investigation, of the statutory authority to conduct an investigation and of Appellant's right to counsel deprives the Agency of the power to undertake and maintain a proceeding under R.S. 4450 and 46 CFR 137 looking to suspension or revocation of Appellant's license;

(2) under a recent Supreme court ruling, Appellant did not fail to navigate C.E. DANT at moderate speed in fog; and

(3) an unexpected turn to the right by M/V AEGEAN SEA was the sole cause of collision, leaving Appellant free from any fault actionable in this proceeding.

Appearance: Howard, Le Gros, Buchanan and Paul, Seattle, Washington, by: Thomas F. Paul and E. Joseph Burnstin, Jr., Esqs.

PRELIMINARY

This case has earlier been brought before the Commandant in untimely fashion. After the hearing began on 18 September 1972, Appellant moved to dismiss the charge on the grounds that a failure of compliance with 46 CFR 136.07-7 by the Investigating Officer precluded action to suspend or revoke Appellant's license in proceedings conducted under 46 CFR 137. The Administrative Law Judge denied the motion but, on Appellant's request and over the Investigating Officer's objection that he might well lose witnesses who were then present and available, granted a motion to adjourn the hearing so that Appellant could seek and "order from the Federal Court in the nature of a declaratory judgment." Although

28 October 1972 was set as the date for reconvening, it was not until 5 December 1972 that Appellant's counsel reappeared. Subject to Appellant's fundamental objections as to authority to proceed, the taking of testimony of the Investigating Officer's witnesses was begun on 7 December 1972. The testimony of the witnesses was obtained piecemeal until 31 January 1973.

In the interval after 18 September 1972, Appellant did file an action in the U.S. District Court, on 11 October 1972, seeking a declaratory judgment. On the same date, he filed a purported "appeal" to the Commandant from the Administrative Law Judge's denial of his motion. On 3 November 1972, the Commandant advised Appellant that there is no place in the proceedings for "appeals" from interlocutory rulings of an Administrative Law Judge, acknowledging that any asserted error could be urged on the statutory appeal provided for in the event of an initial decision adverse to Appellant's interest.

When the hearing was recessed on 13 January 1973, after the Investigating Officers witnesses had finally been heard, no day was set for reconvening but the parties were left subject to call, pending action by the District Court.

On 28 February 1973, the District Court entered judgment against Appellant. The written order dismissing the complaint was not filed until 3 April 1973. On 21 March 1973, the Investigating Officer moved that the hearing be reconvened since Appellant was scheduled to go on vacation on about 2 April. Nothing occurred on the record until 30 May 1973. At that time neither Appellant nor his counsel appeared before the Administrative Law Judge, although it was entered in the record that Appellant had been on vacation from 2 April to 20 May, at which time he had rejoined his ship. A substitute counsel was then recognized on the record. He was without authority to proceed. The Administrative Law Judge then adjourned the hearing until 23 July 1973. No one appeared for Appellant on that date, but on 1 August Appellant and counsel finally appeared and the hearing proceeded to conclusion, the Administrative Law Judge having denied a motion for further delay to permit Appellant to pursue an appeal in the Court of Appeals.

The proceedings here point up that a desire of a party to litigate in a Federal court a question such as an Administrative Law Judge's authority to hear a matter should not be permitted to interfere with the orderly procedure of a hearing under R.S. 4450 and 46 CFR 137. Obviously, a temporary restraining order or injunction of a proper court would halt, at least for the nonce, an administrative hearing but it is not fitting for an Administrative Law Judge, absent such an order, to suspend his own proceeding out of curiosity to see how a Federal judge will rule on the matter or

for the mere convenience of the complaining party who challenges his authority to proceed, especially where, as here, the dispersal of available witnesses results.

OPINION

I

One minor point, emphasized by Appellant, may well be disposed of before proceeding to the more significant matters of this appeal. He complains of a statement made in the Administrative Law Judge's "Opinion." It reads:

> "The course of C. E. DANT was 284 degrees twenty-five minutes before collision took place. At this time a 14 degree alteration of course to the left was made. However, seven minutes later, the course was altered back again to 285 degrees. This, it would appear, nullifies the earlier course change." D-15.

Appellant urges that the displacement from his original track caused by seven minutes of movement along a heading 14 degrees to the left of the original heading was not "nullified" by the return of the vessel to about its original heading.

I agree. I do not believe that the Administrative Law Judge had in mind that 285 is one degree to the right of 284 and that after about an hour and a half C. E. DANT would have arrived at a point which would be on the original 284 track line projected. It is true that the movements described, in the absence of any other factor, altered what would have been the CPA of AEGEAN SEA by an additional half mile (although Appellant had not then even computed a CPA). The error in the use of the word "nullify" is, however, of no consequence because the movements of C. E. DANT, as established by the evidence, were what they were, and had their consequences, no matter how they are characterized by the Administrative Law Judge.

More troublesome, in the same vein, are two other statements made by the Administrative Law Judge upon which he appears to have placed some stress. He found (D-7):

"...The change of course from 285 degrees to 282 degrees made at 0107 hours was not ordered to give wider clearance to the approaching AEGEAN SEA." Since AEGEAN SEA was to the right of C.E. DANT and the change (whatever one may believe as to its effectiveness) was to the left, the effect would in fact be to give more room to AEGEAN SEA, and since Appellant declared that was his intention in making the change, the explicit finding that such was

not his intention is the result of pure speculation in view of the fact that there is no evidence in the record to indicate any other purpose and no other purpose is even suggested. Similarly, another finding appears (also at D-7) that "... at 0107 hours, the respondent altered the course to 282 degrees to give sufficient clearance to the fishing vessel on his port hand." This is the same change to the left as that mentioned just above.

Apart from the fact that nothing in the record supports a finding that there was at 0107 a fishing vessel "approaching" on C. E. DANT'S "port hand" (there is evidence that fishing vessels had already been passed and left to port), there is no reason to attribute to Appellant a belief that turning to the left would give greater clearance to a vessel approaching on his left.

Neither of these findings is accepted insofar as the intentions of Appellant are concerned and any possible prejudice is dispelled by viewing the facts simply as they were established, without speculation.

II

Appellant's primary basis for appeal involves the relationship between parts 136 and 137 of Title 46 CFR and between the respective proceedings conducted under those parts. He formulates his objection to the instant proceeding thus:

> "...Captain Lord moved that the charges against him be dismissed in that the investigation had been illegally conceived and pursued because he was not advised of the statutory authority under which the Coast Guard was proceeding and he was not advised of his right to counsel as required by 46 CFR 136.07-7."

The Administrative Law Judge's denial of the motion is urged as error.

Most succinctly, it may be said that Appellant asserts the denial of a right. His claim to the right may be, in light of the language used by him, based on constitutional grounds, a statute, or a regulation. Although Appellant's grounds appear to shift and his arguments can be reduced to the assertion that the fault was the failure of an Agency to follow a procedure set forth in its own rules, without more, necessity dictates that the wider view be taken here. Each consideration, however, calls for a review of the statutory basis for this proceeding and the implementing regulations.

III

Appellant correctly concludes that the basic statutory authority for procedures both for investigating marine casualties and for suspension or revocation of a mariner's license has but one statutory source, R.S. 4450, as amended (46 U.S.C. 239). We are concerned here with the statute as it has existed since the general recasting and amendment of 1936, and not before.

Appellant observes:

> "Attention is invited to the fact that 46 U.S.C. 239 mentions only investigations and nowhere mentions hearings before an Administrative Law Judge although it does contemplate suspension or revocation proceedings against a license."

An element of this statement, which on its face is eminently correct, could be taken as a complaint, that the statute was not complied with because it does not provide for a hearing before an Administrative Law Judge. It cannot seriously be taken that Appellant objects to the hearing by such a trier of facts. No such complaint was made at the hearing, or in the Federal court action which was permitted to interrupt the administrative hearing, nor is the matter further elaborated on this appeal. It must be assumed that Appellant would really have complained if he had not been given opportunity for hearing before an Administrative Law Judge and had been faced only with, at worst, a summary suspension of his license, or at best, a proceeding conducted under the literal directions of R.S. 4450. In fact, however, what Appellant has said here contains the solution to the very maze he attempts to take refuge in.

The language of 46 U.S.C. 239 is not, it must be clearly understood,the language of R.S. 4450, as amended. It reflects editorial substitutions and interpolations found desirable for insertion by the editors of the code because of collateral amendments to the law, and it does not actually reflect even all of these. The pertinent language of R.S. 4450 is found in section 4 of the Act of May 27, 1936, c. 463, 49 Stat. 1381. Except for the addition of the words "suspended or" in subsection (g) by Act, July 29, 1937, c. 536, 50 Stat. 544, the language of 1936 has never been directly amended, despite the appearance of later citation at the end of the text of 46 U.S.C. 239.

The first collateral amendment came about by Executive Order 9083, February. 1942, which transferred the Bureau of Marine Inspection and Navigation to the Coast Guard, in the Navy Department, as a wartime measure. The "Temporary Wartime Rules" at 46 CFR 136 (Cumulative Supplement to original edition) made certain changes in procedures to be followed in the application of R.S.

4450. Only one such element need be mentioned here. Investigation of marine casualties was separated from suspension and revocation proceedings, which were to be conducted in an adversary manner before a designated "hearing officer," with no "third" or "outside" parties. 46 CFR 136.106, loc. cit. This concept formed the basis for modern procedure as set out in the current regulations.

Reorganization Plan 3-46, 11 F.R. 7875, 60 Stat. 1097, effective July 16, 1946, made permanent the transfer of certain functions of the Bureau and of the Secretary of Commerce pertinent thereto. It abolished the offices of the Director of the Bureau and of the various boards and other functions and vested all the relevant authority thereof in the person of the Commandant of the Coast Guard, then back in the Treasury Department. It was on the strength of this Plan that the editors of the 1946 edition of the U.S. Code substituted the terms "Commandant," "Coast Guard," and the like for terms representing the abolished Bureau, officers, and functions transferred. (Subsequent reorganization provided for in Reorganization Plan 26-50, July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 31 U.S.C. 1001-note, and in section 6, Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 937, 49 U.S.C. 1655, vested these powers and functions in the Secretary of the Treasury and the Secretary of Transportation, respectively and successively. The first of these reorganizations is acknowledged generally in the U.S. Code by "Historical Notes." The second transfer is not generally reflected in the Code at all. Redelegation and subdelegation by the Secretaries to the Commandant render the present text generally acceptable without specific statement of the ultimate source of authority.)

The Administrative Procedure Act of June 11, 1946, ch. 324, Stat. 237, became effective on 11 September 1946, but sections 7 and 8, dealing with hearings and decisions, did not become effective until 11 December 1946, and section 11, relative to the selection of examiners under the Act, did not become effective until 11 June 1947. It was commonly accepted that these proceedings to suspend or revoke licenses were not "of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute" such as to be exempt from the Administrative Procedure Act since the boards provided for in R.S. 4450 were specifically abolished in the 1946 Reorganization Plan. It followed that an adjudication proceeding in such cases (with note taken of the distinction between investigation and adjudication) could take place only before the Commandant himself (the "Agency") or before an examiner appointed under the Act.

A "hearing Officer" under the "Temporary Wartime rules" was already prohibited from any association with the investigative

process in a case heard by him. An "examiner," under the new law, was to be independent in that respect but also to be independent from the supervision of those engaged in investigative aspects of the process. In anticipation of the effective date of the "examiner" provision of the Act, and conformably to the procedure already established for hearings before a single hearing officer functioning only with respect to suspension or revocation of licenses and not involved with the investigation preliminary to the proceeding looking to such ends, Part 136 of Title 46 CFR was amended, effective 11 December 1946 (11 F.R. 13971) (CFR, 1946 Supplement) to provide for "Examiner" designated by the Commandant. At this time, proposed rules to replace the Temporary Wartime Rules were already before the public (11 CFR 11014). Another rules proposal was made at 12 F.R. 1109, Feb. 18, 1947. After public hearing in March 1947 and consideration of all comments and suggestions, the new regulations were published at 12 F.R. 6737, Oct. 14, 1947. Parts 136 and 137 of Title 46 CFR were promulgated substantially as they exist today (subsequent changes not being relevant to this issue here).

The stated purpose of the rules, appearing in the preamble to the October 1947 Federal Register document, shows a clear understanding of the impact of the 1946 Reorganization Plan and the Administrative Procedure Act on R.S. 4450, its construction and its application. It was said:

> "The regulations for casualty and accident investigations and suspension and revocation proceedings had to be revised to comply with the changes in the statutes made by Reorganization Plan...and the Administrative Procedure Act. The regulations separate insofar as possible procedural requirements from substantive requirements and provide definite procedures to be followed in investigations and suspension and revocation proceedings."

As is evident, Part 136 was directed entirely to casualty investigations while Part 137 dealt exclusively with suspension and revocation proceedings, irrespective of the source or grounds for belief that such proceedings should be undertaken. This was in marked contrast to the original Parts 136 and 137, as they were effective prior to the Temporary Wartime Rules, which, reflecting the statute as it then applied, blended both the investigative and adjudicative proceedings in one action before "Boards." The one significant difference between the parts was that 136 dealt with "A" Boards which were concerned only with casualties involving loss of life while 137 provided for the "B" and "C" Boards which dealt with other casualties and with cases arising from other sources than marine casualties. It was evident then that the "Agency" (the

Commandant) could not in 1947 resurrect the old "board" concept for suspension and revocation proceeding in light of the Administrative Procedure Act and it is believed that even had the Reorganization of 1946 not taken place the Secretary of commerce would not have been able to maintain "Boards" as dual investigative and adjudicatory bodies.

It is clear even in the 1936-1942 applications of R.S. 4450 that two entirely different functions, casualty investigation and action looking to the suspension or revocation of a license, were involved. A "board" "reported" as to casualties and neither the Director of the Bureau nor the Secretary of Commerce was called upon to do or say or publish anything. There was no "appeal" from the record of a board as a record of casualty investigation. On the other hand, subsection (g) of the statute is distinguishable in the procedure for suspension or revocation. The rights of the party to notice and hearing are set forth, the board is required to make recommendations, the Director (if he finds reason to suspend or revoke) must make findings and issue an order, and the Secretary must accept a timely appeal and render a decision in the matter.

It can be seen that the rights of a party are somewhat different under the purely investigative aspect of the proceeding and the potentiality for suspension or revocation of a license. It is also evident that a party who was accorded all of his rights with respect to counsel and the like, insofar as subsection (g) was applicable, and who, adversely affected by a recommendation of a board, was presented with findings and an order by the Director and had the right to appeal to the Secretary, could not complain that the Agency had failed to comply with either the statute or its own regulations if, for example, it could be shown from the nature of the case it had been referred to the wrong king of board. The Administrative Procedure Act not only emphasized the disjunction between the two proceedings under R.S. 4450 but forbade any mingling of procedures, except, of course, what might be stipulated to for convenience.

The dichotomy in R.S. 4450 is more clearly perceived in the light of the Administrative Procedure Act and its code successors. The regulations in Part 136 and 137 are differentiated precisely in that dichotomy. It is noted that a record of proceedings conducted under Part 136 cannot be used adversely to a party who was not accorded his rights under that part in a proceeding under Part 137 without his consent. 46 CFR 137.20-117. It is also noted that admissions made by a party in an investigation under Part 136 may not be used (with irrelevant exception) adversely to him in a proceeding under Part 137, again without his consent. 46 CFR 137.20-120,125. Suspension and revocation proceedings under Part 137 are thus hermetically sealed in the interest of the party. Part

137 provides specifically for implementation of the rights of a party in proceedings held under that part. 46 CFR 137.05-10, 137.05-25, 137.20-35, 137.20-45.

A cursory comparison of 46 CFR 136.07-7, the section relied upon as a criterion by Appellant, and 46 CFR 137.20-35 amply demonstrates that two different types of proceeding are involved in the two different parts of the regulations. A rule of proceeding for one does not carry over as a rule of proceeding in the other.

It is true that cases could arise in which evidence or information developed in one proceeding would be excludable from consideration at a suspension and revocation hearing, but that would be because the rules for hearing procedure so allowed or required, not because the rules for some other proceeding were not complied with. Since a proceeding under Part 137 is complete and entire in itself and is to be conducted in accordance with the provisions of the basic statute relative to suspension and revocation of licenses and of the relevant requirement of 5 U.S.C. 551 et seq., in light of judicial glosses where controlling, I hold specifically that when a party has been accorded all his rights in a Part 137 proceeding, when evidence properly excludable has been excluded, and when the procedural requirements for a hearing under the part have been met, no alleged error in a proceeding under Part 136, nakedly and without more, constitutes a bar to hearing under Part 137.

IV

On the matter of procedure Appellant here does not assert error under the regulations in Part 137 itself. At the hearing, as on appeal, he asserted no prejudice stemming from the alleged violation of the procedural rule established at 46 CFR 136.07-7 for investigation of marine casualties. In the words chosen by Counsel as to that, Appellant argued "...The consequences of that is presumed to be irreparable prejudice." R-29. No legal support has been indicated for this novel proposition. The divorcement between two different types of proceeding has been discussed at length so as to dispose of Appellant's contention.

Lest some misconception remain in Appellant's mind, however, because his cited legal authorities do not hew to his basic line of argument but indicate other partly formed theses, I will touch briefly on the considerations of potential error.

Nothing here is to be construed as an acknowledgement that error was committed by the Investigating Officer when he "failed" on first boarding C. E. DANT to advise Appellant in precise language before anything else that he had the right to counsel and

that his investigation was being conducted under the authority of R.S. 4450. The law does not require nugatory acts. Appellant himself testified at hearing that, without formalities, he knew the Investigating Officer's purpose in boarding his vessel. Indeed, it would be most surprising if a licensed master sincerely urged that he did not know why and under what authority a Coast Guard investigator (identified as such, moreover, by the business card he had presented to Appellant) came aboard his vessel in the middle of the Strait of Juan de Fuca while its stem was still firmly imbedded in the side of another vessel. The right to counsel is, of course, an important right. It is unfortunate that the Administrative Law Judge needlessly limited the Investigating Officer's preliminary testimony as to the occasion of boarding C. E. DANT to a "yes" or "no" as to whether he had immediately advised Appellant that he had the right to counsel. It could well be that proper exploration of the matter might have disclosed Appellant's contention as merely meretricious, but we need not speculate on that. Section 136.07-7 gives a rule of procedure for "opening" an investigation. The rule is the same whether the investigation is conducted by a single investigating officer or by a specifically appointed Board of Investigation. No hard and fast rule or definition can be laid down as to the precise moment when an investigation is "opened." It is obvious that when a Board is formally convened the proceedings before the Board "open" when the Board is assembled and the Chairman so acts, and that much preliminary work is necessitated before the Board "opens." It is also obvious that an "investigation" of some kind "opened" in this case before the Investigating Officer even met Appellant, else why was he miles from his office aboard the stricken ship? Again, we need not speculate. There is sufficient evidence in the record to show that Appellant's procedural rights were not violated even in the Part 136 investigation.

Whatever happened aboard C. E. DANT, which the Administrative Law Judge's abrupt rulings prevent us from knowing, there is no doubt that an investigation under Part 136 was held and completed at some time after the casualty. Counsel, at hearing, acknowledged that such an investigation took place "in Victoria" (presumably British Columbia) and that the Investigating Officer did then formally announce the statutory authority for his activity and did advise the parties (which probably, although not necessarily, included persons connected with the other vessel) of the rights conferred by R.S. 4450. R-14. It must be inferred, in fact, that Counsel at the hearing also represented Appellant in the other proceeding. Since 46 CFR 136.07-7 specifically addresses itself to casualty investigations the appropriate forum for protesting an alleged violation of the section was in that forum, i. e., in the proceeding held in Victori. It may be imagined that at the outset of that proceeding Appellant heard for the first time that he could

be represented by counsel at the investigation. By hypothesis, then, he could complain that having no knowledge of this right to that time he had not excised it. The one available and appropriate remedy, of course, would be to give him the opportunity to obtain counsel. It would not be necessary to abandon all efforts to investigate the casualty, only to grant a delay reasonably needed. This was not the case, however, since Appellant was then represented by counsel. The point is that even an untimely appraisal of a right, announcement of which is called for in section 136.07-7, would not serve to abort the very proceeding for which the right was granted; how much less then can it bear upon another proceeding, different in its purpose, under another regulatory system which provides for its own distinct procedure against which no complaint, real or imagined, has been lodged!

V

One last observation may be made here on the alleged violation of procedural rule. In all court decisions cited by Appellant involving a procedural error there is a distinct pattern of remedy prescribed. Appellant refers us to U.S. ex rel. Accardi v Shaughnessey (1954), 347 U.S. 260, Vitarelli v Seaton (1959), 359 U.S. 535, and American Farm Lines v Black Ball Freight (1970), 397 U.S. 532. The rule expressed is clear. When there is a violation of a procedural rule which is intended to confer a benefit upon a party, the proceeding as to which the benefit is denied will be set aside, but there is no bar to a proceeding in which the benefit is accorded. The matter may be undertaken again with proper procedure.

This does not support Appellant's contention that an alleged procedural error in one proceeding stands always and forever as a bar to any other proceeding, whether merely subsequent, collateral, related or even independent.

It is axiomatic that in a criminal proceeding evidence obtained as a result of denial of a person's rights, e.g. to counsel, or against unreasonable search and seizure, may not be used against him at trial, and its admission is reversible error. In no case cited by Appellant has this error acted as a bar to trial; there is always open the way to another trial at which the contaminated evidence is not used. Appellant cites no instance in which this exclusionary rule has been applied in a civil suit, and most important, makes no claim here that any evidence used against him was obtained in violation of such a right.

Special emphasis is placed by Appellant on the decision in United states v Heffner, C.A. 4 (1969) (dissenting opinion filed 1970), 420 F. 2nd 809. There, an IRS agent, contra an announced

policy of the Service, failed to notify the defendant that a possible tax fraud was under investigation and that the defendant could "retain counsel." Appellant correctly quotes the court:

> "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fail to do so, its action cannot stand and court will strike it down." (at 811);

and

> "The Accardi doctrine furthermore requires reversal irrespective of whether a new trial will produce the same verdict." (at 813).

From this, Appellant concludes that "since the Coast Guard did not follow its own regulations set out in 46 CFR 136 in the investigations conducted pursuant to 46 U.S.C. 239, the charge against... [him] should be dismissed."

The conclusion is unrelated to the premises.

Apart from the fact, already pointed out, that regulations in 46 CFR 136 do not pertain to actions under 46 CFR 137, although the authority for both procedures ultimately is traceable to R.S. 4450, as amended (46 U.S.C. 239), the Heffner case is, of course, a criminal case. Dismissal of charge under Part 137 would be analogous to dismissal of the indictment in the Heffner case. This the court did not do. Its action was no more than the familiar one of suppressing evidence (a statement made by the accused to the agent prior to the giving of the prescribed advice). In the words of the court quoted by Appellant (and in fact), the way was left open to a retrial with the omission of the "contaminated" evidence. The dissenting judge thought not only that the precedents cited, Accardi et al., did not apply to the case but that the evidence apart from that to be suppressed was independently overwhelming. The majority chose reversal, while practically conceding conviction on the other evidence if a new trial on the indictment should be had, in the hope that a second prosecution would not be undertaken (footnote, at 813).

All of this has no relevancy here. Since there is no evidence to be suppressed in any case there is no fault to evidence to be remedied even if the rule in the Heffner case is applied at all.

VI

On the merits of his case, Appellant urges that the decision in Union Oil Co. v the SAN JACINTO (1972), 409 U.S. 140, has

somehow changed the meaning of the term "moderate speed in fog" so as to justify his speed of 20 knots in the Strait of Juan de Fuca under the conditions found. I think that his reliance is misplaced.

The Supreme Court there said:

> "[The `half the distance' rule] is premised on the notion that when a ship is traveling under foggy weather conditions in waters in which other ships might be proceeding on intersecting courses, the speed of each ship must be such as to enable her to stop within half the distance separating the ships when they first sight each other. Implicit in the rule, however, is the assumption that vessels can reasonably be expected to be traveling on intersecting courses." (145)

Too literal an interpretation cannot be placed on this single thread of rationale since it appears to rule out the "head and head" situation. Not only does the rule necessarily apply in that situation, the dissenters in the case feared that the holding might be construed as limited to that situation:

> "But surely the half-distance rule does not apply only to head-on collisions... . Moreover, the tanker here should not be any less at fault because the tug emerged tangentially to her course rather than on a head-on collision course." (pp 149-150) (Emphasis supplied.)

It is not necessary to analyze this decision as might be appropriate in a law review article. What it means for vessels other than two in the precise conditions of that case need not be explored. The total effect of the decision on the question of distance-to-stop and visibility "remains to be seen." 4 J. Maritime Law 475 (Apr. 1973).

Appellant would liken his situation to that of a vessel proceeding on the right hand side of a narrow channel, in an area in which crossing traffic is not to be reasonably expected, with a fog bank on the left hand side of the channel only, into which the other vessel, on a generally reciprocal heading, disappeared while still more than a mile distant. The strait in the instant case is not a "well-defined and relatively narrow channel." Union Oil Co., at 146. On the evidence adduced from Appellant himself, vessels may enter from sea either from the south side or the north side and may be reasonably expected to traverse the Strait on either side or on either diagonal depending on the inland destination. Appellant himself had already angled across more than half the breadth of the Strait at the time of collision and was angling back again so as to

depart southward along the coast.

With due regard for testimony about "fog patches" it is seen that with the exception of the occasion of one fix visibility was never good enough for visual bearings. C. E. DANT was not proceeding alongside a well defined fog bank (on the necessary assumption that such was the phenomenon presented in the SAN JACINTO case). For at least twenty minutes prior to the first visual contact with AEGEAN SEA visibility from C. E. DANT was less than half a mile and the other vessel was known to be ahead, bearing from dead ahead to never more than thirty degrees on the starboard bow. (There is no direct evidence of true bearings available here. The relative bearing, of course, fluctuated with each change of C. E. DANT's heading.) The "half the distance rule" is clearly applicable in this case.

VII

Basically connected with Appellant's reliance on the SAN JACINTO decision is his argument that an "unexpected" right turn of AEGEANGN SEA was the cause of collision. Attempted linking of this turn to the application of the rule announced in that case fails because AEGEAN SEA did not, with any similarity to the movement of SAN JACINTO, suddenly turn out of a fog bank into an area relatively clear ahead of the other vessel. AEGEAN SEA was maneuvering, whatever it may have done, within the same fog that enveloped C. E. DANT. It appeared in sight only because it had reached the circumference of the surrounding visibility. A word may be said, nevertheless, about the turn to the right.

It appears that this turn, like many another activity of each ship, was a sine gua non condition for this collision. In a hearing like this, it was not necessary for Appellant to have proved how the collision occurred or even that the other vessel was at fault; however, once the conditions of the collision were established by the evidence against Appellant he had the burden, to merit dismissal of the charges, to persuade not only that there was fault on the part of AEGEAN SEA but that vessel's movements were the sole cause of the collision with no contribution by Appellant himself.

In the absence of evidence from the records or personnel of AEGEAN SEA, the only evidence we have on that vessel's movement prior to the time it became visible to the lookout and persons on the bridge of C. E. DANT is that presented by Appellant himself.

He gives assurance that he made radar contact with the other vessel at a distance of sixteen miles, that he plotted the course and speed of the vessel, and that he maneuvered always to increase the distance of the apparent CPA and avoid collision. Appellant's oral reconstruction of events, while relatively clear as to times, leaves much to be desired in the way of connecting times with bearings and ranges, with headings, and with rudder orders. (Here the absence from the record of C. E. DANT's course recorded trace, which was available to the parties, was referred to in oral testimony, and was inexplicably never offered into evidence, is a definite lack.) It is enough merely to look at a last crucial section of Appellant's version of the facts.

Appellant had presumably plotted AEGEAN SEA on a course of 106° t at a speed of 13-15 knots, with no perceptible change from 0100, when he first completed a computation, until 0116. Since the total distance covered by the two ships from the first contact to collision was 16 miles and the elapsed time was 28 minutes we find that the plot was reasonably accurate to some extent with the probability of the higher, 15 knot, speed of AEGEAN SEA being likely.

Appellant's plotting showed to him at the completion of his work at 0116 a CPA of one mile to his right. He changed course to 270 to increase that distance. The last radar range and bearing on AEGEAN SEA showed it to be thirty degrees on the starboard bow and distant about 1.2 or 1.3 miles. Appellant did not specify whether this relative bearing was from his own heading of 282 of the last one of 270. Since that source observation was the last of the final trio used in his computation it is a reasonable inference that C. E. DANT's heading was still 282.

If this is so, we may allow one half mile as the absolute minimum distance covered by C. E. DANT from 0116 to 0118. This leads to a result that AEGEAN SEA must have changed course immediately at 0116 to just about 154° t, about, at least, twenty degrees to the right of the heading apparent at impact. It also indicates an increase in speed at the same time to about 27 knots. While the required course change is extremely doubtful, the speed change is unbelievable.

If C. E. DANT is credited with no reduction of speed through the water for those critical two minutes it traveled about two thirds of a mile in that time. This would reduce the amount of sudden increase of speed by AEGEAN SEA by only two knots, yielding a speed for the two minutes of only 25 knots (incredible enough), but requires course change to about 165°t, a heading absolutely inconsistent with the aspect of the vessel just before collision.

Within the same two extremes of speed and distance traveled for C. E. DANT in the two minute period, and on the hypothesis, entirely inconsistent with Appellant's asserted use of the last range and bearing of AEGEAN SEA in his computation, that the bearing was relative to a C. E. DANT heading of 270, the apparent course change of AEGEAN SEA is almost within an acceptable spread, to a heading ranging from about 148° t to about 138° t, but the required speeds of the vessel are still excessive, from 21 to 24 knots.

From another point of view, it is easily seen that a range of 1.2 miles on AEGEAN SEA two minutes before collision requires an irreducible speed of 16 knots for that vessel and then only if the vessel were dead ahead at the time of observation on an exactly reciprocal course. For every diminution of C.E. DANT's speed for that time, for every degree of relative bearing change from dead ahead, and for every bit of difference of AEGEAN SEA's heading from the exact reciprocal, AEGEAN SEA's speed would have to increase accordingly, even to the 27 knots envisioned in the first example considered above.

What this means is not that Appellant is from the outset bound to prove in minute detail the factors involved in the collision, but that his attempted transfer of the fault established by evidence of his own speed and the fog conditions fails completely because his evidence on the matter is essentially unreliable at the critical points. Whether the failure of Appellants evidence resulted from originally faulty observation, imprecise plotting, or erroneous recollection, the fact that his version of events lacks probative value leaves us with the undisturbed fact of excessive speed in fog in violation of the rules, contributing to a collision.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 13 September 1973, is AFFIRMED.

E.L. PERRY
Vice Admiral, United States Coast Guard
Vice Commandant

Signed at Washington, D.C., this 22nd day of August 1974.

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